

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Second Periodic Review of the)	
Commission's Rules and Policies)	MB Docket No. 03-15
Affecting the Conversion to)	
Digital Television)	RM 9832
)	
)	
)	

ORDER

Adopted: June 29, 2004

Released: June 30, 2004

By the Chief, Media Bureau:

1. The Media Bureau has received a request for waiver of the digital television ("DTV") simulcasting requirements in Section 73.624(f)¹ of our rules filed on behalf of Educational Broadcasting Corporation ("EBC"), permittee of noncommercial television station WNET-DT, Channel 61, Newark, New Jersey.² As discussed below, we grant EBC's waiver request.

2. *Background.* Section 73.624(f) of the Commission's rules requires DTV licensees to simulcast 50% of the video programming of their analog channel on their DTV channel by April 1, 2003. This requirement increased to a 75% simulcasting requirement on April 1, 2004, and increases to a 100% requirement on April 1, 2005.³ The simulcasting requirement was intended to ensure that consumers enjoy continuity of free over-the-air video programming service when analog spectrum is reclaimed at the end of the transition. The Commission has stated that it may be difficult to terminate analog broadcast service if broadcasters show programs on their analog channels that are not available on their digital channels.⁴

3. In the *Notice of Proposed Rule Making* initiating the second periodic review of the transition to digital television, adopted January 15, 2003, the Commission sought comment on whether it should retain, revise, or remove the simulcasting requirement.⁵ Among other questions, the Commission asked whether broadcasters have a market-based incentive to simulcast that makes a simulcasting requirement

¹ 47 C.F.R. § 73.624(f).

² See Letters from Barbara K. Gardner to Marlene H. Dortch, dated May 28, 2004 and June 18, 2004.

³ 47 C.F.R. § 73.624(f)(i)-(iii).

⁴ *Fifth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd 12809, 12833, ¶ 56 (1997) ("*Fifth Report and Order*"), *on recon.*, 13 FCC Rcd 6860, *on further recon.*, 14 FCC Rcd 1348 (1998), *recon. dismissed*, DA 99-1361 (rel. July 12, 1999), *recon. dismissed*, FCC 00-59 (rel. Feb. 23, 2000).

⁵ *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, Public Interest Obligations of TV Broadcast Licensees*, 18 FCC Rcd 1279 (2003) ("*Second DTV Periodic Review NPRM*").

unnecessary.⁶ The Commission also asked whether the simulcasting requirement is causing broadcasters to forgo creative uses of digital technology, and whether something less than the ultimate 100% simulcasting requirement would be sufficient to protect analog viewers while allowing for innovation on DTV channels. The Commission also sought comment on how to define simulcasting, and whether the current dates for the phase-in of simulcasting requirements are appropriate. The *Second DTV Periodic Review NPRM* did not propose to reduce or eliminate the minimum digital operating requirements that are currently pegged to the simulcasting requirements.⁷

4. On April 29, 2003, the Media Bureau issued an *Order* granting noncommercial educational (“NCE”) stations a six-month waiver of certain simulcasting requirements until November 1, 2003.⁸ In this *Simulcast Order* we found that, in light of the burden faced by NCE stations in complying with both the construction and simulcasting requirements at once, and in light of our pending re-evaluation of our simulcasting requirements, good cause existed to grant NCE stations a six-month waiver of the simulcasting requirements in Section 73.624(f).⁹ We also stated that we would consider requests for waiver extensions from NCE stations on their individual merits if the Commission had not yet acted on the simulcasting issues raised in the *Second DTV Periodic Review NPRM* by November 1, 2003. The Media Bureau has granted several additional requests for waiver of the DTV simulcasting requirements to give stations additional time to acquire and install the facilities necessary to meet the simulcasting requirement¹⁰ or to permit stations to experiment with innovative uses of the digital channel.¹¹

5. *EBC Waiver Request.* EBC requests a waiver of the simulcasting requirements of Section 73.624(f) pending the resolution of the simulcasting issues in the Second DTV Periodic Review proceeding to permit WNET-DT to offer a new digital standard definition 24-hour news, public affairs, science, and

⁶ *Id.* at 1302, ¶ 66.

⁷ To the contrary, the Commission proposed that, if the simulcasting requirements in Section 73.624(f) were reduced or eliminated, Section 73.624(b)(1) would be amended to require DTV stations subject to the May 1, 2002, or May 1, 2003, construction deadlines to air, by April 1, 2003, a digital signal for an amount of time equivalent to 50% of the time they provide an analog signal. The digital signal must be aired during prime time hours. This minimum digital operating requirement increased to 75% on April 1, 2004 (requiring airing of a digital signal for an amount of time equivalent to at least 75% of the time the station airs an analog signal), and to 100% on April 1, 2005. *Second DTV Periodic Review NPRM*, 18 FCC Rcd at 1303, ¶ 68.

⁸ *Order, Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion To Digital Television*, 18 FCC Rcd 8166 (2003) (“*Simulcast Order*”).

⁹ *Simulcast Order*, 18 FCC Rcd at 8168, ¶ 6.

¹⁰ See Orders, DA 03-3507 (rel. Oct. 31, 2003) (granting a 4-month waiver of Section 73.624(f) until March 1, 2004 to South Texas Public Broadcasting System, Inc. (“STPBS”)); DA 03-3663 (rel. Nov. 17, 2003) (granting six-month waivers of the simulcasting requirements until May 1, 2004 to three noncommercial stations in New Mexico); DA 04-1101 (rel. April 27, 2004) (granting an additional 6 month waiver to STPBS until September 1, 2004).

¹¹ See *Simulcast Order*, 18 FCC Rcd at 8169, ¶¶ 8-10 (granting a waiver of the simulcasting requirements to Milwaukee Area Technical College (“MATC”) pending issuance of a Report and Order in the Second DTV Periodic Review proceeding to allow MATC to simulcast the analog programming of its two NCE stations on one of its associated digital stations, and to use the other digital station to air high definition programming full time). See also Orders, DA 03-3499 (rel. Oct. 30, 2003) (granting a waiver until issuance of an order in the Second DTV Periodic Review proceeding to permit Twin Cities Public Television, Inc. to simulcast the analog programming of both of its two NCE stations on one of its associated digital stations and to use the other digital station to air high definition programming full time); DA 03-3507 (rel. Oct. 31, 2003) (granting a waiver of the simulcasting requirements to KTWU-DT pending the resolution of simulcasting issues in the Second DTV Periodic Review where the station was providing a wide sampling of innovative high-definition programming as well as a standard definition channel devoted to children’s programming).

history program service, *Thirteen World*, in lieu of its current simulcast of WNET's analog signal.¹² EBC states that WNET-DT currently transmits three digital program streams, each 24 hours per day, seven days a week: (1) *Thirteen HD* – a high definition program service featuring premiere and encore presentations of digital programming produced by WNET/Thirteen and other PBS producers nationwide; (2) *Kids Thirteen* – a standard definition 24-hour digital broadcast educational channel for children, the first offered in the New York metropolitan area; and (3) *Thirteen* – the standard definition simulcast of analog WNET (Channel 13).

6. EBC proposes to substitute *Thirteen World* for *Thirteen*. According to EBC, of the four primary cable providers in the DMA, only one carries *Thirteen*, the digital simulcast of WNET's analog channel. EBC states its understanding that the other three providers do not carry *Thirteen* because it is duplicative of the WNET analog service that each already carries as an analog must-carry signal. EBC states that it expects that the local cable systems will, however, carry *Thirteen World*, thereby providing cable subscribers with access to an additional digital program stream. EBC argues that permitting WNET-DT to carry *Thirteen World* instead of *Thirteen* is a far more productive use of the spectrum as it will provide cable and over-the-air viewers with access to an additional digital program service without depriving viewers of access to WNET's analog programming, which is available over the air and as a must-carry signal. EBC states that adding *Thirteen World* as a third standard definition digital program stream without deleting the *Thirteen* simulcast would significantly degrade the quality of WNET-DT's other digital program streams unless costly additional multiplexing and encoding equipment were purchased and installed. EBC also states that, as more programming becomes available in high definition, *Thirteen HD* will likely simulcast HD versions of programs airing on WNET Channel 13, permitting *Thirteen HD* to evolve into EBC's primary program stream.

7. We find good cause to grant EBC a waiver of the simulcasting requirements in Section 73.624(f), pending the issuance of a Report and Order in the Second DTV Periodic review, to permit it to implement the plan it proposes in its waiver request.¹³ By temporarily waiving the current rules, we are permitting EBC to experiment with innovative uses of its digital channel and to offer additional digital programming to the community while the Commission considers whether to retain, revise, or eliminate the simulcasting requirement. In view of the continued pendency of the Second DTV Periodic Review proceeding and EBC's commitment to airing digital programming, grant of the waiver requested by EBC is warranted.

8. The action we take today does not waive the existing rules regarding the minimum hours of operation on digital channels. Thus, WNET-DT must air a digital signal for an amount of time equivalent to at least 75% of the time it provides an analog signal. In addition, a digital video program signal must be aired during prime time hours. The minimum digital operating requirement increases to 100% on April 1, 2005 (requiring airing of a digital signal for an amount of time equivalent to at least 100% of the time the station airs an analog signal). Stations, both commercial and NCE, that have been granted an extension of time to construct their DTV facilities must comply with the minimum digital operation requirements in effect at the time the station commences digital operations.

9. **IT IS HEREBY ORDERED** that, pursuant to the authority contained in Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, the Request for Waiver of Simulcasting Requirement filed on behalf of Educational Broadcasting Corporation **IS GRANTED** to the extent described herein.

¹² According to EBC, *Thirteen World* is intended as a destination channel for viewers interested in those non-fiction genres, and will feature both encores from favorite PBS series such as *NOVA*, *Nature*, and *Frontline*, and special programs that will air exclusively on this channel.

¹³ 5 U.S.C. § 553(b)(3)(B). The Commission may waive its rules where good cause is shown. See 47 C.F.R. § 1.3; *Wait Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

10. This action is taken pursuant to authority delegated by Sections 0.61(h) and 0.283 of the Commission's rules, 47 C.F.R. §§ 0.61(h), 0.283.

FEDERAL COMMUNICATIONS COMMISSION

W. Kenneth Ferree
Chief, Media Bureau